In the Supreme Court of the United States.

OCTOBER TERM, 1909.

INTERSTATE COMMERCE COMMISSION, appellant,
v.
CHICAGO, BURLINGTON & QUINCY Railroad Company et al., appellees.
No. 641.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO ADVANCE.

On behalf of the appellant, the Solicitor-General respectfully moves the court to advance the above-entitled cause for hearing during the present term, for the following reasons:

1. The cause is a proceeding in equity under section 16 of the act to regulate commerce, approved February 4, 1887, as amended June 29, 1906, brought by appellees in the Circuit Court of the United States, to enjoin the enforcement of an order of the appellant, made under and by virtue of the provisions of said act.

2. On March 2, 1909, the Interstate Commerce Commission, after a hearing before it upon complaint,

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made an order reducing the rate to be charged by the Chicago, Burlington & Quincy Railroad Company, the Chicago, Rock Island & Pacific Railway Company, Chicago & North Western Railway Company, Chicago, Milwaukee & St. Paul Railway Company, the Atchison, Topeka & Santa Fe Railway Company, the Missouri Pacific Railway Company, Union Pacific Railroad Company, and Wabash Railroad Company, for the transportation of articles of the first class from Chicago, Ill., to Denver, Colo., from $2.05 to $1.80 per 100 pounds, and from St. Louis, Mo., to Denver, Colo., from $1.85 to $1.62 per 100 pounds; and a similar reduction was made on articles of second, third, fourth, and fifth classes and classes A, B, C, D, and E. The Commission prescribed as the effective date of the order May 1, 1909, which was later changed by the Commission to July 1, 1909. On May 18, 1909, the above-named railroad companies filed a bill of complaint against the Interstate Commerce Commission praying the court to enjoin the enforcement of said order. June 12, 1909, a demurrer was filed by the Commission. After argument, the court entered a restraining order, effective until it could determine the issues in the case of the *Interstate Commerce Commission* v. *The Chicago, Rock Island and Pacific Railway Company et al.*, No. 663 on the docket for the present term. Thereafter, on September 13, 1909, a preliminary injunction, effective until the final hearing of the case, was issued by Judges Grosscup and Kohlsaat, Judge Baker dissenting. The order of the Commission was enjoined on the

ground that the Commission was without power to make the order complained of.

The case involves the power of the Commission, as well as the power of the courts to review and supervise the action of the Commission, in prescribing rates for the future.

3. The speedy determination of the lawfulness of the Commission's order prescribing rates for the future and the extent to which the judicial power can supervise the action of the Commission is a matter of great public importance.

4. The act to regulate commerce, approved February 4, 1887, as amended June 29, 1906, in section 16, makes the provisions of "An act to expedite the hearing and determination of suits in equity," and so forth, approved February 11, 1903, applicable to all such suits, and said section provides that cases of this character shall have in this court "priority in hearing and determination over all other causes except criminal causes."

As the questions involved in this case are similar to those involved in Nos. 663 and 664 of this term, it is suggested that this case be set for hearing upon the same day.

I am authorized to state that counsel for the appellees concur in this motion.

LLOYD W. BOWERS,
Solicitor-General.

DECEMBER, 1909.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE INTERSTATE COMMERCE COMMISSION, appellant,
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY et al. } No. 641.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This case comes here upon appeal from a decree by a majority of the judges of the Circuit Court for the Northern District of Illinois, temporarily restraining and enjoining the enforcement of an order of the appellant. In many respects this case is similar to the one in No. 663, this term, *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co. et al.* This brief will simply set forth the facts and issues and will refer to the argument contained in appellant's brief in No. 663.

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The opinion of the court below and the dissenting opinion of Judge Baker is contained in the record in No. 663, pages 1054–1062.

To the bill of complaint were attached as exhibits the complaint of George J. Kindel against certain carriers (Rec., pp. 20–28), and the opinion of the Commission upon said complaint (Rec., p. 28); certain affidavits were submitted in support of the bill of complaint (Rec., pp. 43–63).

ACT OF THE COMMISSION.

George J. Kindel, a merchant and manufacturer of Denver, Colo., filed with the Interstate Commerce Commission December 14, 1906, his petition of complaint attacking certain rates charged by certain carriers from New York, Chicago, St. Louis, Omaha, and points taking similar rates to Denver, on the ground that the same were excessive and discriminatory, and attacking rates from Denver to Salt Lake City upon similar grounds. By amended complaints the complainant attacked class rates from Chicago and St. Louis and the Missouri River cities to Denver. Allegations as to certain commodity rates and certain class rates were also contained in the complaint and amended complaint, but these were not specific, and the testimony before the Commission as well as arguments, oral and by brief, were directed to the class rates from Chicago, St. Louis, and the Missouri River cities to Denver. The rates complained of from Chicago to Denver were made up of the local rate from Chicago

to the Missouri River cities plus the local rate from Missouri River to Denver. The rates complained of were as follows, on the various classes from Chicago to the Missouri River:

Class	1	2	3	4	5	A	B	C	D	E
Rate	80	65	45	32	27	32	27	22	18½	16

To which rates were added class rates from Missouri River crossings to Denver as follows:

Class	1	2	3	4	5	A	B	C	D	E
Rate	125	100	80	65	50	60	45	40	35	30

Making a total rate from Chicago to Denver in cents per 100 pounds, as follows:

Class	1	2	3	4	5	A	B	C	D	E
Rate	205	165	125	97	77	92	72	62	53½	46

The class rates from St. Louis to Denver were made up of the local class rates from St. Louis to the Missouri River, plus the local class rates from the Missouri River to Denver. The local class rates from St. Louis to the Missouri River were in cents per 100 pounds, as follows:

Class	1	2	3	4	5	A	B	C	D	E
Rate	60	45	35	27	22	24½	19½	17	13½	11

These last-mentioned rates added to the local class rates from Missouri River to Denver as above given made a through rate from St. Louis to Denver in cents per 100 pounds, as follows:

Class	1	2	3	4	5	A	B	C	D	E
Rate	185	145	115	92	72	84½	64½	57	48½	41

These rates complained of were found by the Commission to be unjust and unreasonable, and the Commission prescribed as maximum rates from

Chicago to Denver the following in cents per 100 pounds:

Class.....	1	2	3	4	5	A	B	C	D	E
Rate.....	180	145	110	85	67	80½	63	54	47	40

The Commission also prescribed as maximum rates for the transportation from St. Louis to Denver in cents per 100 pounds the following:

Class.....	1	2	3	4	5	A	B	C	D	E
Rate.....	162	127	101	80½	63	74	56	50	42	36

Answers were duly filed by all the carriers against whom the complaint before the Commission was directed, testimony was taken, briefs were filed, and oral arguments were had before the Commission. After full consideration the Commission filed its report, which is correctly set forth as Exhibit C to the bill of complaint (Rec., p. 28), and issued its order, which is correctly set forth in the bill of complaint (Rec., p. 11). The order was thereafter served upon the complainants and would have become effective May 1, 1909, but by order of the Commission the date of its going into effect was extended until June 1, 1909. The bill of complaint was filed May 18, 1909. A stay order was issued by the Circuit Court, which order remained in effect until final hearing was had in the case of the *Chicago, Rock Island & Pacific Railroad Company et al* v. *Interstate Commerce Commission*, at which time a temporary injunction herein was issued, from which decree this appeal has been taken.

The bill of complaint attacked the order of the Commission on two general grounds; first, that the order was in excess of the powers conferred upon the Commission, and secondly that it deprived complainants of the right to charge their just and reasonable rates by compelling them to charge rates prescribed by the Commission, which latter rates would not give "to the carriers a fair and reasonable return for the services rendered by them in the transportation of goods and merchandise from Chicago and St. Louis and east thereof to Denver." In support of the allegation that the order of the Commission was in excess of the power conferred upon it complainants alleged:

(1) That the order was entered without regard to the issues and to the evidence offered before the Commission and that no evidence was offered by complainant in support of his allegation that the class rates were unreasonable and excessive, except certain comparisons of rates per ton per mile to other points, and without any evidence being offered or it being claimed by him that conditions with respect to rates used by him in such comparisons were similar.

(2) That the order was made by the Commission for the express purpose of destroying the Missouri River as a basing point in the making of rates from Chicago, St. Louis, and eastern territory to territory west of the Missouri River, including Denver, and for the purpose of substituting in place of said

basing-point system a system of making through rates regardless of basing lines, and lower than the rates to and from basing points.

(3) That the order is unreasonable and unjustly discriminatory against the Missouri River cities and in favor of Chicago and St. Louis and territory east thereof, in that it gives to Chicago and St. Louis an advantage over said Missouri River cities of 25 and 23 cents, respectively, on first class and a corresponding advantage on other classes, as compared with the existing relation of rates.

(4) That it costs more to operate west of the Missouri River than in territory east thereof; that rates complained of before the Commission were reasonable and just and did not afford to the carriers anything more than a fair return for the services rendered by them; that the reduction prescribed by the Commission would, if the order goes into effect, deprive complainants "of their property without due process of law, in violation of the fifth amendment to the Constitution of the United States."

It was further averred that to put into effect the rates prescribed by the Commission would necessitate a readjustment and realignment of rates throughout the western territory, which readjustment and realignment would cause complainants to reduce their revenue more than $———— (amount not stated; Rec., p. 17).

The Attorney-General filed his certificate in accordance with the expediting act May 21 1909.

Thereafter the Commission filed its demurrer, based substantially upon the following grounds:

(*a*) That the Commission had in every respect complied with the statutory procedure in making its order; that there was no allegation of fraud.

(*b*) That the bill failed to state any fact from which the court could determine from the face of the bill that the rates prescribed by the Commission were unreasonably low or confiscatory; that such allegations as attempted to plead confiscation were mere conclusions of the pleader.

There was no argument upon the demurrer, and the same is as yet undisposed of. In support of the application for a preliminary injunction complainants filed the affidavit of Marvin Hughitt, president of the Chicago & Northwestern Railway Company; the affidavit of E. P. Ripley, president of the Atchison, Topeka & Santa Fe Railway Company; and of James J. Hill, who for nineteen years was president of the Great Northern Railroad Company. To the filing of these affidavits counsel for the defendant objected on the ground that they were immaterial and irrelevant, being intended only to show that the system of making through rates less than the sum of the locals would affect vitally all important lines of business in the country and would work injury to the West and its business.

The report of the Commission speaks for itself, but for the convenience of the court and of counsel we call attention to certain specific parts thereof. The application for the preliminary injunction was predicated largely upon the arguments made in the Burnham, Hanna, Munger case and there is no testimony whatever to show that the rates prescribed by the Commission would not afford to the carriers using the same all proper and fair remuneration for the services performed. An examination of the report of the Commission shows that the complaint, hearings, and argument were all directed to the issue of whether the rates complained of were just and reasonable and what would be just and reasonable rates. Material portions of the Commission's report are as follows:

> The complaint specifically alleged that the rates from Chicago, St. Louis, and the Missouri River to Denver were excessive, but the allegation respecting rates from Denver to Utah points was in general terms. (Rec., p. 28.)
>
> The commissioner who took the testimony stated at the hearing that it was doubtful if the Commission could make a general order of the kind which complainant desired on a general complaint like that in question, and still more doubtful if it would undertake to do so in this particular case. Thereupon the complainant, before any testimony had been introduced by defendants, amended his com-

plaint by filing the class rates from Chicago, St. Louis, and Omaha to Denver, and from Denver to Utah points, alleging that same were excessive and that they should be reduced. He later filed a list of commodities as to which he desires a specific order.

Witnesses were introduced by complainant who testified to particular rates and regulations which were alleged to be unreasonable, but many of such matters were not referred to in the complaint and defendants had no notice, until the testimony was introduced, that they would be subjects of investigation. Hence the matters thus complained of are not before us in such manner that any order can be entered with relation thereto, but assuming the testimony introduced as to them to be correct, it would seem that some new adjustment should be had. However, if satisfactory adjustment is not made we can deal with the question only under a complaint which properly raises those points. We are authorized to reduce a rate, or to modify a rule of practice which affects a rate, only after full hearing upon complaint, and no order can be entered by the Commission affecting a carrier's rates or regulations except after such carrier has been given full and fair opportunity to be heard.

The testimony showed that the bulk of the traffic to and from Denver moves under class rates. The general question presented, therefore, is an adjustment of the class rates from Chicago, St. Louis, and the Missouri River to Denver, and from Denver to Utah points.

While complainant alleges that the rates to and from Denver are excessive, and while the testimony reinforces this assertion, the grievance most insisted upon was that the present adjustment of rates favors cities upon the Missouri River, of which Kansas City is fairly illustrative, and unjustly discriminates against Denver.

The first-class rate from Chicago to Kansas City is 80 cents, and from Kansas City to Utah common points $2.05, making a through rate, based on Kansas City, of $2.85. From Chicago to Denver the first-class rate is $2.05, and from Denver to Utah points $1.64, making a through rate, based on Denver, of $3.69, higher than the combination on Kansas City by 84 cents. The service rendered by defendants is the same in either case (except that in one instance the traffic might be unloaded at Kansas City and in the other instance at Denver), and in the Utah territory the merchant at Denver is at a decided disadvantage as compared with his competitor at Kansas City, in dealing in commodities that originate east of the Missouri River, while the manufacturer at Denver is under a like disadvantage, as compared with the manufacturer at Kansas City if the raw material comes from east of the Missouri River.

This advantage held by the dealers and manufacturers at Kansas City and other Missouri River cities is due to the fact that the carriers have made the Missouri River a basing line for rate-construction purposes—that is, rates from points east of that river to points

west thereof are made by adding together the rates to the river points and the rates from the river points; and to Denver and Utah points and to a great expanse of territory lying west of the Missouri River the through rates are made up from the sums of the rates to and from the Missouri River basing-line cities. The first-class rate from Chicago to the Missouri River is 80 cents, from the Missouri River to Denver it is $1.25, and from Chicago to Denver it is the sum of these two, or $2.05. As to Denver, therefore, the dealer in Kansas City can purchase at Chicago or other eastern points, ship to Kansas City, and reship to Denver at the same total rate that is charged the Denver dealer if he ships direct from Chicago or some other eastern point. (Rec., p. 29.)

The carriers can haul traffic from Chicago direct to Denver cheaper than they can haul it to Kansas City, permit it to be unloaded, and at some subsequent time reloaded and forwarded to Denver. The rate for a long through haul should ordinarily be less than the combination of two or more local rates that are included within that distance over the same lines. Through rates for long hauls are necessary to the development of the country and to the removal of such discriminations as Denver complains of in this instance.

We see no good reason for withholding from Denver reasonable through rates for through service. Rates made up on combination on a closely adhered to basing line must be made with regard to the cost of the terminal services, which is necessarily high. If traffic

moving from Chicago to Denver is sold, resold, unloaded, and reloaded at Kansas City, the Denver dealers and the consumers of that traffic must pay the profits and extra costs involved in those transactions. The combination rate must include the cost of that extra service. If, on the other hand, the traffic moves directly through from Chicago to Denver, the cost of the extra terminal service at Kansas City is saved to the carriers, and, as the cost is provided for in the rate that is applied to such through movement, the rate is too high if that cost is not incurred, except in cases in which the combination rate is made up from factors which are so low in themselves as to result in a reasonably low through rate. While it is proper in fixing rates for transportation to give consideration to commercial conditions and needs, rates for services over the same lines, between the same points, but under differing conditions, must be made with some consideration for the difference in the cost of the service.

In *Burnham, Hanna, Munger Dry Goods Co. et al.* v. *Chicago, Rock Island & Pacific Ry. Co. et al.* (14 I. C. C. Rep., 299), we dealt with the complaint of Kansas City and other Missouri River cities against rates from the Atlantic seaboard to the Missouri River cities made on combination on the basing line at the Mississippi River crossings. (Rec., p. 30.)

We there dealt with through rates that were constructed by adding together the rates from points of origin to the Mississippi River crossings and the rates from the Mississippi River cross-

ings to the Missouri River cities, no through joint rates being in effect. In the present case some of the defendants have their own lines and their individual rates from Chicago to Denver; others of the defendants unite in joint through rates. (Rec., p. 32.)

The present rate adjustment is, in our opinion, unjustly discriminatory against Denver and in favor of Kansas City and other Missouri River crossings. This discrimination can be removed only by the establishment of some new relation of rates, and it is not within the authority or power of this Commission to remove it except through a reduction in rates, which necessarily operates to reduce the revenues of the defendants.

In considering a new adjustment or relationship of rates, it is necessary and proper to take into consideration all the interests involved, as well as those of complainant and defendants herein. A new relationship or adjustment of rates affects the interests of other communities and commercial centers, and in making an adjustment to remove the discriminations found in this case action should be in harmony with the principles that have been adopted in other readjustments. Justice can not be done by prescribing an adjustment which might serve to satisfy the complaint in this case if the effect of it is to impose upon some other persons or localities the burden that is lifted from the complainant herein. (Rec., p. 32.)

As has been seen, the present rate adjustment between the East and the West is built upon basing lines at the Mississippi River

and at the Missouri River. The Ohio River crossings form a similar basing line on traffic to and from the southeast, but no other such basing lines exist between the Atlantic seaboard and the West. It is not possible to have a rate adjustment which places all towns and cities upon an exact equality. Some places possess advantages of natural location which, together with other influences, have made them commanding commercial centers in a certain territory, and consideration must be given to such advantages and development in readjusting rates in cases where development, increase in population, growth of manufacturing and production, and increased traffic on railroads, warrant changes in the rate adjustments which have obtained in the past.

In the *Burnham, Hanna, Munger case* (*supra*) we did not reduce the local class rates between the Mississippi and the Missouri rivers; we did order a reduction in the separately established rates applicable to through business, through joint rates from the East to the Missouri River cities not being in existence and not being prescribed, because of the fact that east of Chicago and the Mississippi River Official Classification governs the tariffs and west of Chicago and the Mississippi River Western Classification governs. Following the principle there established, we think that here the class rates from Chicago to Denver and from St. Louis to Denver should be less than the sums of the local rates based on the Missouri River.

Rates to points in Colorado other than Colorado common points, and, as we understand it, to many points in New Mexico and Wyoming, are based upon the Colorado common-point rates, and rates are so adjusted that in distribution of traffic brought from the East the Colorado common points have the State of Colorado and some points outside thereof as practically exclusive territory.

In the Spokane case (15 I. C. C. Rep., 376) we held that the reasonableness of a rate between two points served by two or more carriers could not be determined by consideration alone of that line which is shortest and most favorably situated as to operations, earnings, etc., but that the entire situation must be considered.

This record does not disclose the expense of building the railroads between Chicago and Denver, but in other cases estimates of cost of constructing lines in Kansas and southern Nebraska have been laid before us, and from a general knowledge of the territory and the lines serving same we are convinced that there is nothing unusual in the original cost of building or in the present cost of maintaining roads through this open territory which is generally free from heavy grades. The country lying between the Missouri River and Denver does not present difficulties in railroad building or maintenance substantially greater than are presented by the territory between the Mississippi and Missouri rivers. Generally the density of traffic is less west of the Missouri River

and there are other reasons why rates may reasonably be higher in that territory.

The first-class rate from New York City to Chicago, nearly 1,000 miles, is 75 cents; from Chicago to Omaha, 500 miles, 80 cents; from the Missouri River to Denver, short line, 538 miles, $1.25; and from Denver to Ogden, 600 miles, $1.64. The traffic manager of the Union Pacific Railroad was asked how, in view of the established scale of rates east of the Missouri River, he could justify his rates under consideration west of that river, and replied that the lower basis in force in the East was due to greater density of traffic and greater earnings.

We found in the Spokane case, with reference to the Great Northern and Northern Pacific railways, that the traffic and earnings of those transcontinental lines compare favorably with the strongest lines in the East. It may be instructive to state these facts with respect to the Union Pacific Railroad. For that purpose and for use in further considering the general reasonableness of these rates we give below two tables, the first showing gross earnings per mile, net earnings per mile, and ton-miles per mile upon all railroads of the United States, both as a whole and by the territorial groups as defined for statistical purposes, the Union Pacific being principally in groups seven and eight, and the second showing these same facts with respect to the different lines, including the Union Pacific, reaching Denver from the East.

YEAR ENDED JUNE 30, 1906.

	Gross earnings per mile of road.	Income from operation per mile of road.	Number of tons carried 1 mile per mile of road.
Group I	$15,528.00	$4,579.00	743,634
Group II	22,517.00	7,641.00	2,443,924
Group III	13,789.00	4,058.00	1,713,615
Group IV	8,216.00	3,002.00	879,506
Group V	7,350.00	1,981.00	640,485
Group VI	8,690.00	3,136.00	811,977
Group VII	9,108.00	4,184.00	767,530
Group VIII	6,885.00	2,325.00	506,392
Group IX	5,848.00	1,533.00	421,150
Group X	9,532.00	4,166.00	572,574
United States, average	10,460.00	3,548.00	982,401

YEAR ENDED JUNE 30, 1907.

Atchison, Topeka & Santa Fe Railway	$11,092.64	$4,266.50	821,068
Chicago, Burlington & Quincy Railroad	9,218.28	2,653.70	802,722
Chicago, Rock Island & Pacific Railway	7,964.58	2,433.95	549,965
Missouri Pacific Railway	6,620.41	1,909.80	569,930
Union Pacific Railroad	15,144.12	6,547.99	1,146,918

The last table is for the year 1907, the first for the year 1906. The figures for 1907 somewhat exceed those for 1906, and for purposes of comparison we state here corresponding figures as to the Union Pacific for the year 1906.

In that year the ton-miles were 1,081,431, showing a density of traffic considerably in excess of the average for the whole United

States and materially in excess of every territorial group except Group II and Group III. The gross earnings from operation were $13,465 per mile, exceeding by more than 25 per cent the average for the entire United States, substantially equaling Group III, and exceeded only by Groups I and II. Its net earnings from operation were $5,962 per mile, exceeding by 75 per cent the average of the entire United States, and materially exceeding those for every group except Group II.

The Union Pacific Railroad Company, according to its operating report of June 30, 1907, embraces 1,901 miles of main track and 1,092 miles of branch lines, making a total of 2,993 miles. Its bonded indebtedness is $100,000,000, at 4 per cent, being about $33,000 per mile. Its common stock outstanding is $195,000,000, its preferred stock $100,000,000, making a total of $295,000,000, or $98,000 per mile. The report states that these stocks have been issued for the purpose of purchasing other stocks and that the amounts mean nothing when given in miles of road.

During the year covered by this report the road earned from operation $15,000 per mile, and its net income from operation was $6,547 per mile, or a total of $19,678,798. After deducting interest on $100,000,000 of funded debt and taxes, there would still remain from operation over $14,000,000, or 14 per cent upon $100,000,000 of capital stock. These sums, $200,000,000, would equal about $70,000 per mile for the system, and without doubt more than represent the fair value of the property

upon the basis of cost of construction or of cost of reproduction.

As already suggested, we can not in determining a competitive rate select that railroad which is the shortest or the most advantageously situated and limit the rate to what would allow that property fair earnings. We must consider this entire situation and determine a reasonable rate not merely with reference to the Union Pacific, but with reference to all lines serving these Colorado common points via reasonably direct lines.

Four different railway systems other than the Union Pacific reach Colorado common points from the Missouri River, namely, the Burlington, the Rock Island, the Santa Fe, and the Missouri Pacific. These defendants were asked to give the Commission some idea of the density of traffic upon their lines between the Missouri River and Denver. Their statistics are kept in such a manner that they were unable to furnish us the exact information desired, but they have given certain statistics which perhaps answer the same general purpose. Below is a table showing the total tons of freight from the Missouri River and points east to Colorado common points for the years 1899 to 1906, inclusive. It will be seen that the total tonnage is not large, but that there has been a substantial increase from 1899 to 1906.

The apparent decrease from the years 1901, 1902, and 1903 was accounted for by traffic officials by the fact that certain construction work under way in Colorado during those

years required the transportation of an unusual quantity of materials. The increase in Colorado business has not been as marked as in the general business of the transcontinental lines.

Westbound tonnage into Colorado from Missouri River and east thereof, in tons.

1899	281,379	1903	438,025
1900	351,871	1904	364,637
1901	454,732	1905	364,145
1902	505,923	1906	436,453

We were also furnished with statements showing the number of trains operated over various lines between Denver and the Missouri River, and one system was able to give us its tonnage and earnings by States. From all of this it fairly appears that the density of traffic on these lines from the Missouri River to Denver, except the Union Pacific upon the north and the Santa Fe upon the south, is not heavy, and that this is particularly true of the last 200 or 300 miles before reaching Colorado common points. The earnings upon this portion of the various systems are comparatively small. This is not, however, conclusive upon the reasonableness of rates now in effect. These lines must be considered in the nature of branch lines. The profit from this business does not accrue upon the 200 or 300 miles of railroad where it is the major part of the traffic, but upon the haul up to the Missouri River, where it is in the nature of surplus traffic.

In the *Burnham, Hanna, Munger case* (*supra*), we found that the defendant carriers had for years maintained a line of proportional class rates between Chicago and the Twin Cities, applicable on traffic from the Atlantic

seaboard, one-third less than their local class rates between Chicago and the Twin Cities, and that their local rates had not thereby or therefore been pulled down or reduced. We can not accept the theory that if in this case the through rates from Chicago and St. Louis to Denver are reduced, like reductions in the local rates from Chicago or St. Louis to the Missouri River or from the Missouri River to Denver must automatically follow. If rates applicable only to through business and that are materially lower than the local rates can be maintained between Chicago and St. Paul, and in the many other instances which could be cited where the carriers adopt and maintain the same principle, without forcing reductions in the local rates, it is obvious that the same thing can be done between Chicago and the Missouri River or between Chicago and Denver. As has been seen, the class rates from the Missouri River to Denver, short line distance 538 miles, are on a scale of $1.25 per 100 pounds, first class, and from Denver to Utah common points, about 650 miles, they are on a scale of $1.64 per 100 pounds, first class. *Measured by any test these rates are in both instances unreasonable and excessive.* It seems obvious that they must be revised, either by voluntary action of the carriers in conformity with the principles announced in the *Spokane case* (*supra*), or in some other proceeding before this Commission. For that reason no reduction of those rates will be ordered in this case, although upon the record we are convinced that they are unwar-

rantedly high, and that reasonable reduction therein would not work any undue reduction in the revenues of defendants. If those rates are reduced so that the combination on the Missouri River or on Denver results in reasonable through rates, it does not necessarily follow that these through rates must again be reduced. Certainly it is better in every instance where important readjustment of rates is necessary to have it worked out by the carriers or with their cooperation, if that be possible.

The present class rates from Chicago to the Missouri River are, in cents per 100 pounds, as follows:

Class.....	1	2	3	4	5	A	B	C	D	E
Rate.....	80	65	45	32	27	32	27	22	18½	16

The present class rates from Chicago to Denver are, in cents per 100 pounds, as follows:

Class.....	1	2	3	4	5	A	B	C	D	E
Rate.....	205	165	125	97	77	92	72	62	53½	46

being made up of the sums of the class rates from Chicago to the Missouri River crossings, as above, and the class rates from the Missouri River to Denver, as follows:

Class.....	1	2	3	4	5	A	B	C	D	E
Rate.....	125	100	80	65	50	60	45	40	35	30

The present class rates from St. Louis to Denver are, in cents per 100 pounds, as follows:

Class.....	1	2	3	4	5	A	B	C	D	E
Rate.....	185	145	115	92	72	84½	64½	57	48½	41

being made up of the class rates from St. Louis to the Missouri River, in cents per 100 pounds, as follows:

Class.....	1	2	3	4	5	A	B	C	D	E
Rate.....	60	45	35	27	22	24½	19½	17	13½	11

and the above-named class rates from the Missouri River to Denver.

As hereinbefore stated, we find that this rate adjustment is unjustly discriminatory in favor of the Missouri River cities and against Denver. The through class rates from Chicago to Denver and from St. Louis to Denver are unreasonably high in and of themselves. The reduction of those rates as herein ordered will not involve any unreasonable or undue reduction of the revenues of the defendants affected thereby, and for these reasons and upon the whole record we are of the opinion that for the future reasonable class rates from Chicago to Denver should not exceed, in cents per 100 pounds, the following:

Class.....	1	2	3	4	5	A	B	C	D	E
Rate.....	180	145	110	85	67	80½	63	54	47	40

and that reasonable class rates from St. Louis to Denver should not exceed, in cents per 100 pounds, the following:

Class.....	1	2	3	4	5	A	B	C	D	E
Rate.....	162	127	101	80½	63	74	56	50	42	36

(Record, p. 33, 34, 35, 36, 37, 38.)

ASSIGNMENTS OF ERROR.

The assignments of error relied upon in this court are the following (Rec., p. 68):

3. Said Circuit Court erred in holding that the Interstate Commerce Commission was without power to make the order complained of.

4. Said Circuit Court erred in holding and decreeing that the order complained of entered by the Commission on March 2, 1909, was void and of no effect.

7. Said Circuit Court erred in holding that there was no inquiry by the Interstate Commerce Commission respecting the reasonableness or unreasonableness of the rates between Chicago and St. Louis and Denver other than on the zone theory of apportioning trade.

8. Said Circuit Court erred in permitting to be filed by complainants affidavits of James J. Hill, Marvin Hughitt, and E. P. Ripley in support of the application for a preliminary injunction.

ARGUMENT.

For the most part the question involved in this case will be determined by the decision of the court in No. 663. This is especially true if the court reverses the decree in 663. We contend, however, that even if that decree should be affirmed upon the ground that the order of the Commission therein would result in unjust discrimination against shippers not having the benefit of such order and undue preference to those shippers who would enjoy the rates prescribed by such order, still the decree in this case should be reversed because there is no allegation or proof in support thereof to the effect that the order herein would result in either unjust discrimination to shippers not having the benefit of such order or undue preference to shippers having the benefit of such order. The presumption which attaches to the validity of an order made by the Commission can not be overcome by a mere allegation in the bill of complaint or by the mere expression of opinions by inter-

ested parties. No showing was made by the bill or affidavits in support thereof that the carriers could not put the Commission's rates into effect and still receive ample revenue for all service performed for the public. Nor was there any showing that if the Commission's order be literally complied with it would result in any discrimination which the carriers could not remove without so reducing their total revenue as to result in confiscation. We here refer to brief and argument in support of the appeal in No. 663, and make the same so far as applicable a part hereof.

CONCLUSION.

The complaint before the Interstate Commerce Commission specifically attacked class rates from Chicago and St. Louis to Denver. The testimony before the Commission is not before the court, but in the absence of a showing that there was no evidence whatever upon which its findings could be predicated, it must be presumed that that evidence established that the rates complained of were unjust and unreasonable.

The Commission prescribed what, in its opinion, would be just and reasonable rates as maxima thereafter to be charged by the carriers. Every intendment of law and of fact supports the validity of the Commission's action. The wrongs and injuries resulting from practices existing prior to and at the time of the passage of the act to regulate commerce and its amendments were intended to be removed

and remedied by Congress. Long existence does not sanctify or render legal that which was illegal. The Commission has undertaken to prescribe, as a rule of conduct for the particular transportation embraced within its order, the principle that the longer the haul the less the rate per ton per mile. That rule has been affirmed and approved by this court in many cases. What is a reasonable rate is a question of fact whose determination by the Commission, in the absence of a showing of a deprivation of a constitutional right, this court will not review.

The decree of the court below should be reversed, with directions to dismiss the bill.

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LUTHER M. WALTER,
EDWIN P. GROSVENOR,
Special Assistants
to the Attorney-General.

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